NO. 81-6435

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CAREY DEAN MOORE,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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QUESTIONS PRESENTED

1. Does the Nebraska Supreme Court procedure for reviewing capital murder cases without comparison of similar cases of "criminal homicide" which have not resulted in capital punishment violate the Eighth and Fourteenth Amendments?

2. Is the Nebraska Supreme Court's refusal to follow legislatively mandated review procedures and its affirmance of Petitioner's sentence of death in apparent violation of Nebraska law violative of the Eighth and Fourteenth Amendments?

3. Does application of the aggravating circumstances that the murder "manifested exceptional depravity by ordinary standards of morality and intelligence" to the facts of Petitioner's case violate Godfrey v. Georgia, 446 U.S. 420 (1980)?

   a. If so, does the affirmance of Petitioner's sentence based in part on such aggravating circumstances violate the Fourteenth Amendment principles of Stromberg v. California, 283 U.S. 359 (1931) and Stephens v. Zant, 631 F. 2d 397 (5th Cir. 1980) modified 648 F. 2d 446 (5th Cir. 1981), pending review by Petition for Writ of Certiorari in Zant v. Stephens, No. 81-89?

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IN THE SUPREME COURT OF THE UNITED STATES
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NO. _____

CAREY DEAN MOORE,

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vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered on January 29, 1982.

OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska in the case of Carey Dean Moore is reported at 210 Neb. 457, 316 N.W. 2d 33 (1982), attached as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was rendered on January 29, 1982 and entered on that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the following provisions of Nebraska law. (See Appendix B).

Neb. Rev. Stat. 1943, Reissue 1979, 28-303

Neb. Rev. Stat. 1943, Reissue 1979, 29-2519 through 29-2525

Neb. Rev. Stat. 1943, Reissue 1979, 29-2528

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Neb. Rev. Stat. 1943, Reissue 1979, 29-2524.01 through 2524.02

STATEMENT OF THE CASE

The Petitioner was arrested on August 29, 1979 near Charles City, Iowa on a traffic stop by an Iowa State Trooper. In checking the Petitioner's identification and as a result of the volunteered statements made by the Petitioner, he was taken into custody on suspicion of auto theft. Shortly thereafter, in making routine checks with the Omaha Police Department, the Iowa police officials were requested to hold the Petitioner in connection with an ongoing investigation of the two homicides in Omaha, Nebraska. Omaha police arrived in Charles City, Iowa where the Petitioner was being held and after properly advising the Petitioner of his rights, the Petitioner admitted the commission of the Omaha murders. He waived extradition and was returned to Nebraska where charges were filed by the County Attorney of Douglas County, Nebraska, charging him with two counts of first degree murder (T-1,2). The Court appointed the Public Defender to represent the Petitioner after he indicated he had no funds with which to obtain counsel (T-35). (See certified copy of Order of Appointment and Petitioner's Poverty Affidavit appended hereto).

Pretrial hearings were held to suppress certain statements made by the Petitioner and the trial court ruled all such statements were admissible.

The Petitioner also challenged the constitutionality of Nebraska's death penalty statutes in a motion to the trial court (T-70), which was denied in its entirety (T-75). These issues were again raised by the Petitioner in his brief and arguments to the Nebraska Supreme Court (see Appendix A).

The Petitioner waived his right to a jury and was tried and convicted by the Court of both charges and after a determination by a three judge panel in its order of sentence, the Petitioner was sentenced to death on each first degree murder count (T-76).

The conviction and sentences were appealed to the Nebraska Supreme Court which affirmed the conviction and sentences in an opinion rendered January 29, 1982 (see Appendix A).

THE NEBRASKA PROCEDURES FOR IMPOSING THE SENTENCE OF DEATH UPON THE PETITIONER ARE DEFICIENT IN THE FOLLOWING RESPECTS:

A. THE NEBRASKA SUPREME COURT IMPROPERLY FAILED TO COMPARE THE PETITIONER'S CASE WITH OTHER "CRIMINAL HOMICIDES" AS REQUIRED BY NEBRASKA STATUTE.

The Nebraska Supreme Court in Petitioner's case affirmed the sentence of death imposed upon the Petitioner after comparing the Petitioner's case only with those of other capital murders which have been appealed to the Nebraska Supreme Court since April 20, 1973. The Nebraska Supreme Court specifically held that it would refuse to follow the legislatively mandated procedure for comparing the Petitioner's case with other "criminal homicides" to determine whether the "sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances".[1] Sections 29-2521.02, 29-2521.03, R.R.S. 1943, Reissue of 1979. The Nebraska Supreme Court, therefore, has, in counsel's opinion, not only failed to comply with the constitutional mandate of this Court in placing a heavy emphasis on appellate review to insure that a situation does not exist wherein "there is no meaningful basis for distinguishing the few cases which

[1]The Nebraska Supreme Court held that the legislative mandate was a violation of the "separation of powers doctrine" and the action of the Nebraska Legislature unconstitutionally, under the Nebraska State Constitution, limits the function of the Nebraska Supreme Court in reviewing capital cases. State v. Moore, 210 Neb. at 474, 476. The Court stated that "It is plain that under the principals we have earlier cited, that legislation which attempts to achieve such results [review of all criminal homicides] is an intrusion of the judicial function, contrary to the separation of powers doctrine and this violates Article II, Section 1 [of the Nebraska Constitution]. Another affect of LB 711 would be to unconstitutionally restrict the appellate review powers of this court under the Nebraska Constitution Neb. Const. Art. 1, Section 23 as that legislation attempts to bind this court by requiring it to apply sentences imposed in some 'analogous' case . . . " 210 Neb. at 476. "Upon this closer review of LB 711, it is clear that the legislature in that act attempts to exercise the judicial function in violation of the Constitution. Sections 2 and 3 of LB 711 must be restricted in their application to a comparison in this Court of only those cases in which the defendant in the District Court has been convicted of murder in the first degree". 210 Neb. at 476. The court thus stating went on to comment that their construction was "co-extensive with our duty under the federal constitution, under our own state constitution, and under the statutory provisions for automatic review [in capital cases)". 210 Neb. at 476.

(death) is imposed from the many cases in which it is not" (Furman v. Georgia, 408 U.S. 238 at 313 (1972)), but has also judicially affirmed the sentence of death upon the Petitioner in defiance of the express legislatively authorized means of determining review of the death sentence in Nebraska.

It was just because of this Court's heavy emphasis on appellate review that the Nebraska Legislature created Sections 29-2521.01 through 2521.04, 29-2522, 29-2524 and 29-2524.01 through 2524.02. These statutes require the Nebraska Supreme Court to review all cases of "criminal homicide" after April 20, 1973, the effective date of the "new" death penalty statute. The words "criminal homicide" clearly encompass in plain language crimes other than those of capital murder. The obvious direction of this Court in its decisions and also in the Nebraska Amendments to its statute concerning the Nebraska Supreme Court review, is to insure "reliability" and "uniformity" in the determination of the death sentence. Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977).[2] The Nebraska statute on comparative review addresses itself to this Court's decisions which accept the proposition that capital cases require special treatment due to the qualitative difference of the penalty of death from other sentences and the subsequent need to insure reliability and uniformity in sentencing. However, the Nebraska Supreme Court has consistently refused to follow the plain

[2]The Legislature of the State of Nebraska passed Section 29-2521.01 and the companion sections requiring comparative review of "criminal homicides" based on its perception of both the legal imperative of this Court and also of the "evolving standards of decency" (Trop v. Dulles, 356 U.S. 86 (1958)) of the citizens of the State of Nebraska. The Legislature expressed the wishes of its citizens that "life is the most valuable possession of a human being, and before taking it, the State should apply and follow the most scrupulous standards of fairness and uniformity". Section 29-2521.01(1). The Legislature expressed what was common knowledge that "charges resulting from the same or similar circumstances have in the past not been uniform and have produced radically differing results". Section 29-2521.01(4). The Legislature expressed the wishes of its citizens that "an offense which would not result in a death sentence in one portion of a state should not result in death in a different portion". Section 29-2521.01(3). And that the review by the Supreme Court of "all criminal homicides" was necessary "in order to compensate for lack of uniformity". Section 29-2521.01(5).

language of these statutes and has allowed sentencing based only on the consideration of the case before it with other death penalty cases in Nebraska subsequent to April 20, 1973. This type of appellate review does not meet the requirements this Court has set forth in Godfrey v. Georgia, 446 U.S. 420 (1980), nor does it comply with the expressed will of the citizens of the State of Nebraska as set forth by the Legislature. The result of the Nebraska Supreme Court's conscious and deliberate refusal to consider "all criminal homicides" renders any judgment on the penalty of death unconstitutional since there has been no meaningful appellate review either under the statutory scheme or under the constitutional requirements set forth by this Court. Previous to the Petitioner's case, Petitioner's position in this regard has been voiced by the lone dissents in recent Nebraska capital cases by its Chief Justice. State v. Peery, 199 Neb. 656, 261 N.W. 2d 95 (1977); State v. Williams, 205 Neb. 56, 287 N.W. 2d 218 (1979); State v. Otey, 205 Neb. 90, 287 N.W. 2d 76 (1979); State v. Holtan, 205 Neb. 314, 287 N.W. 2d 671 (1980); State v. Rust, 208 Neb. 320, 303 N.W. 2d 490 (1981) and State v. Harper, 208 Neb. 568, 304 N.W. 2d 663 (1981).[3] Chief Justice Krivosha in State v. Harper, supra, made a review as required by the Nebraska statutes and, by actually comparing the defendant's case with other criminal homicides rather than with just capital cases, he came to the inescapable conclusion from his analysis that in fact the defendant had been arbitrarily and capriciously sentenced to death. Chief Justice Krivosha's dissent in the Petitioner's case, while not giving any reasons in Petitioner's case, certainly expresses those same

[3] In State v. Harper, Chief Justice Norman Krivosha stated that "I have now concluded that under the limitations imposed upon courts by both the federal and state constitutions the imposition of the death penalty as now applied in most other circumstances is arbitrary and capricious and not permitted". 208 Neb. at 581.

conclusions.[4] In Petitioner's case, for the first time, a second Justice, Justice White, joined Chief Justice Krivosha in dissenting from the affirmance of the defendant's sentence of death. However, the majority of the Nebraska Supreme Court has held that the mandate of the Nebraska Legislature requiring it to compare Petitioner's case to other "criminal homicides" is unconstitutional under the Nebraska Constitution as an unpermitted breach of the separation of powers of the judicial and legislative branches. The Court holds simply that all it is required to do under the federal constitution is what it is doing, that is, comparing the Petitioner's case with other capital cases. After such a review, the majority, reaching a quite different conclusion from the two dissenters who have compared the Petitioner's cases to other "criminal homicides", had no difficulty affirming the sentence of death in the Petitioner's case.

Counsel believes that this Court has relied heavily on the legislative judgments as indicia of the "standards of decency" by which the Eighth Amendment limits are largely defined. See Gregg v. Georgia, 428 U.S. 153, 174-76 (1976); Coker v. Georgia, 433 U.S. 584 (1977). Counsel does not believe this Court has ever been presented before with a case wherein a death sentence was judicially imposed by a state court which had expressly refused to follow the

[4] The Chief Justice Norman Krivosha remarked in his dissent in State v. Harper that the adoption of the Nebraska statute on special procedures for homicide cases and the provisions of LB 711 (the Legislative Bill number for Nebraska's comparative review statute) was "simply a response to the United States Supreme Court's recognition that it is a violation of an individual's constitutional right when the decision to execute is arrived at in an arbitrary and discriminatory manner. The fact that we may create criteria to aid us in imposing the death penalty does not overcome the constitutional prohibition if, after applying the formula, we nevertheless continue to impose the penalty in an arbitrary and capricious manner". (Emphasis in original). 208 Neb. at 582. The Chief Justice further relies on this Court's opinion in Gregg v. Georgia in support of that conclusion. The Chief Justice further notes in his dissent in State v. Harper that while prosecutorial discretion is "not within the control of the courts, and should not be within the control of the courts, I, nonetheless cannot ignore the reality of those matters in attempting to determine whether the death penalty is imposed in a nonarbitrary and noncapricious manner in this state". 208 Neb. at 586. The Chief Justice found clearly from his examination of "a host of cases decided within this jurisdiction. . . that the imposition of the death penalty in most cases in this state is indeed arbitrary and capricious . . .". 208 Neb. at 583.

applicable state statutes requiring review of that sentence.[5] Counsel submits that refusal to review other "criminal homicides" for the reason that there are prosecutorial decisions involved which are outside the control of the courts, still results in the same likelihood that death will be "freakishly" imposed which was the very basis of this Court's determination and decision in Furman v. Georgia, 408 U.S. 238 (1972).[4a]

B. THE NEBRASKA SUPREME COURT AFFIRMED THE PETITIONER'S SENTENCE BASED, AT LEAST IN PART, ON AN UNCONSTITUTIONAL FINDING THAT HIS CRIME "MANIFESTED EXCEPTIONAL DEPRAVITY BY ORDINARY STANDARDS OF MORALITY AND INTELLIGENCE".

The Nebraska Supreme Court in the Petitioner's case expressly found that the Petitioner's crimes "manifested exceptional depravity by ordinary standards of morality and intelligence". Affirming the Petitioner's sentence of death on this ground directly violates this Court's holding in Godfrey v. Georgia, supra.

This Court, in Godfrey v. Georgia, quoting from its decision in Gregg v. Georgia, stated that "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an openended construction". 446 U.S. at 422-23. Of course, in Godfrey v. Georgia, as this Court well knows, the Petitioner killed his wife and his mother-in-law instantly by shooting them in the head with a shotgun. This Court, in reversing the sentence

[4a] See fn. 4, comments of Chief Justice Kirvosha on prosecutorial discretion.

[5] The Nebraska Supreme Court has consistently, up until the Petitioner's case, refused to give any reasons for its refusing to follow the Nebraska comparative review statutes. In State v. Williams, 205 Neb. 56, 287 N.W. 2d 18 (1979) the Court simply stated that to interpret the language of the statute "literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues". 205 Neb. at 76. The Court in State v. Harper, supra, simply stated, in response to a similar request for review of the Court's procedures under the comparative review sections, stated "We decline to do so and we reaffirm our holdings in State v. Williams (cite omitted)."

of death, found that the Georgia Supreme Court adopted an overbroad and vague construction of the aggravating circumstance such that almost any murder could be characterized in that way.

Counsel submits that is exactly the circumstance that exists in the Petitioner's case by the Nebraska Supreme Court's interpretation of the aggravating circumstance here. The Petitioner killed both of his victims instantly and there was no suffering or torture involved. However, the Nebraska Supreme Court would permit this aggravating circumstance under an interpretation which would, in effect, make any capital murder automatically subject to this standard.[6] The Nebraska Supreme Court supports its position by postulating the circumstances that (1) the Petitioner's murders were "cold bloodedly planned as part of robberies", (2) that the Petitioner was going to continue killing and (3) that he had selected older individuals and "his unstated conclusion was that human life in the middle years is less valuable than a younger life". State v. Moore, 210 Neb. at 471.

The first part of the Court's findings would clearly be applicable to any and every first degree murder case since by definition it is a premeditated and deliberate and intentional killing. The Nebraska Supreme Court's further conclusions that this aggravating circumstance should apply, at least in part, because of the Petitioner's "unstated conclusions . . . that human life in the middle years is less valuable than a younger life" is constitutionally impermissible and is based on wholly speculative and unsubstantiated opinions of the members of the Court. If there is to be a specific basis for upholding the penalty of death upon the Petitioner, it is most certainly not in the personal opinions of Supreme Court Justices in reading into the evidence facts which cannot be objectively determined. To do so is certainly to deny the Petitioner due process and create an atmosphere where the penalty of death will not be imposed with "reliability" and "uniformity".

[6] In vacating the sentence of death against the defendant in Godfrey v. Georgia, this Court found "that Petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than any other person guilty of murder . . . there is no principled way to distinguish this case in which the death penalty was imposed from the many cases in which it was not". 446 U.S. at 433.

The Nebraska Supreme Court states that this Court's opinion in Godfrey v. Georgia "clearly does not control in this case" (210 Neb. at 469) and then goes on to indicate one of the reasons it does not was very specific findings of the sentencing panel in Petitioner's case. Such findings, as just summarized above, simply do not meet the standards of this Court in Godfrey v. Georgia.

The Nebraska Supreme Court further seeks to insulate its ruling from this Court's opinion in Godfrey v. Georgia by noting that "the imposition of the death penalty in this case before us did not rest wholly upon a finding of the existence of aggravating circumstance (1)(d) of Section 2523". State v. Moore, 210 Neb. at 469. The Nebraska Supreme Court seemed to put much emphasis on the fact that in Godfrey v. Georgia the sentence of death resulted solely on that one aggravating circumstance, and therefore the Petitioner's case was different since there were clearly other aggravating circumstances existing. State v. Moore, 210 Neb. at 469, 471. This Court presently has under review Zant v. Stephens, No. 81-89, which examines whether a sentence of death can be sustained if even one of several aggravating circumstances is found constitutionally deficient. The Circuit Court in Stephens v. Zant, 691 F. 2d 397 (5th Cir. 1980) in holding that the sentence in that case violated Godfrey v. Georgia, held that where the penalty of death was based on several aggravating circumstances, one of which was subsequently held to be unconstitutional that it was "impossible for a reviewing court to determine satisfactory that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance". Stephens v. Zant, 631 F. 2d at 406.

If the application of the aggravating circumstance that the Petitioner's crime "manifested exceptional depravity by ordinary standards of morality and intelligence" is constitutionally impermissible, then the Petitioner's sentence of death must be vacated.

This is especially compelling in the circumstances of the Nebraska procedure since that procedure utilizes a balancing of the aggravating and mitigating circumstances. The sentence of death can only be imposed if there is a finding that the aggravating circumstances outweigh the mitigating circumstances. See Section

29-2522(1),(2), R.R.S. 1943, Reissue 1979. Obviously, this balance would be altered by the removal from consideration of any aggravating circumstance or part thereof.

The Petitioner's case therefore raises a serious question as to the validity of the Nebraska Supreme Court's holding under this Court's ruling in Stromberg v. California, 283 U.S. 359 (1931), used as authority by the Court in Stephens v. Zant, supra.

CONCLUSION

For all of these reasons, Petitioner respectfully urges this Court to grant his Petition for Writ of Certiorari to the Supreme Court of Nebraska.

Respectfully submitted,

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